REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 10 OF 2020

LINCOLN NDORO NGURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment and sentence of Hon. Ndengeri SRM

delivered on 28.01.2020 in CMCC No. 878 of 2017

at the Chief Magistrate's Court, Embu).

JUDGMENT

1. The appellant herein was charged and thereafter convicted of the offence of forcible detainer contrary to Section 91 of the Penal Code Cap 63 Laws of Kenya, in Embu Chief Magistrate's Criminal Case No. 878 of 2017. The particulars of the offence being that on unknown dates between 13.03.2013 and 19.09.2017 at Gachara area of Mavuria Location of Mbeere South Sub-County within Embu County, being in possession of parcel of Land Number Embu/ Mavuria/1646 measuring 9.0 Hectares of Boniface Njuki Rinji, without colour of right, held possession of the said land in a manner likely to cause breach of peace or reasonable apprehension of a breach of peace, against Boniface Njuki Rinji who was entitled by law to the possession of the said land.

2. The appellant was subsequently found guilty and sentenced to pay a fine of Kshs. 30,000/= in default to serve 6 months' imprisonment. It is this conviction and sentence which necessitated the appeal herein and which was instituted vide the petition of appeal dated 16.10.2020.

3. The appellant having been dissatisfied with conviction and sentence of the trial court moved this court vide a petition of appeal citing the following grounds that:

> ***i.*** *The learned trial magistrate erred in law and fact in convicting the appellant against weight of evidence on record.*
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> ***ii.*** *The learned trial magistrate erred in law and fact when she convicted the appellant despite there being evidence to confirm that the appellant was in occupation of the suit property even before the complainant acquired the same.*
>
> ***iii.*** *The learned trial magistrate erred in law and fact when she failed to consider the fact that the elements of the offence of forcible detainer were never proved.*
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> ***iv.*** *The learned trial magistrate erred in law and fact when she held that the prosecution had proved its case beyond reasonable doubt.*
>
> ***v.*** *The trial magistrate erred in law and fact when she failed to consider the appellants defence and the evidence of his witnesses.*
>
> ***vi.*** *The trial magistrate erred in law and fact when she failed to consider the fact that the appellant's occupation had been peaceful for more than twelve years.*

4. An analysis of the said grounds reveal that the appellant challenges the said conviction and sentence on the basis that the trial magistrate erred in fact and law in convicting the appellant whereas the prosecution had not tendered sufficient evidence to prove its case to the required standard. He thus prayed that the conviction by the trial court be quashed and the subsequent sentence be set aside.

5. The appeal was canvassed by way of written submissions. The appellant in support of his case submitted that, the evidence tendered by the prosecution was not sufficient to sustain the charges before the trial court. Further that, the appellant had lived on the parcel of land since 1968 and that he had actually buried his father as well as other relatives on the subject parcel of land. He submitted that it is undeniable that the respondent holds the title to the parcel of land but it can, however, not be ignored that the appellant claims to have acquired title by way of adverse possession. That the issue of adverse possession cannot be ignored and that the same can't be determined in a criminal case; it was his view that the investigating officer ought to have done thorough investigations to determine the averments raised by both parties herein and more so the period of time that the appellant had been in occupation of the suit land.

6. It was submitted on behalf of the respondent that the prosecution established the case against the appellant herein beyond reasonable doubt. The respondent's submissions were that the elements of the offence were proved more so, the fact that the appellant was in occupation of the land yet he was not the registered owner. Reliance was made on the case of **Albert Ouma Matiya v Republic Busia HCCR Appeal No, 8 of 2012 (2012) eKLR**. Further that the sentence meted out was not harsh as the offence of forcible detainer is a misdemeanour whose punishment is provided under Section 36 of the Penal Code to be imprisonment for a term of two years or fine or both and thus the sentence meted out to the appellant was fair and just in the circumstances. Further that, the appellant's defence was considered by the trial court but the trial court found the same to be weak in the face of the strong and credible evidence by the prosecution.

7. As the first appellate court, I am aware that I am under a duty to reconsider and re-evaluate the evidence on record, bearing in mind that I did not see or hear the witnesses, and reach my own conclusion.[**See Okeno v R [1972] EA. 32** and **Mohamed Rama Alfani & 2 Others v Republic, Criminal Appeal No. 223 of 2002**.]

8. The evidence before this court is as follows: PW1, Boniface Njuki Runji testified that he had purchased the suit property from Adriano and upon payment of the purchase price, title deed was processed in his own name. That when he bought it, the property was free from any encumbrances and that there were no people living on the property. In cross examination, he stated that he bought the property in the year 2013 and upon going back for the next visit in 2014, he found the appellant in occupation of the suit property.

9. PW2, John Njuki Njiru testified that he is a land broker and that PW1 purchased the suit property from him and thus he witnessed the sale agreement between PW1 and Nduma Ndingi.

10. PW3, John Njagi Thung'a testified that he recalled that on 13.03.2013 and 19.09.2017 his father informed him that he was selling his property and so he travelled to Embu to witness the sale. That they met at an advocate's office and witnessed PW1 purchase the suit property; that he was later shocked to hear that someone had instead occupied the same property. During cross examination, he reiterated that the property in question belonged to his father and that he sold it to PW1.

11. PW4, Michael M. Njeru testified that he was the chief of Mavuria Location Mbeere South Sub County and that in March 2016, PW1 reported that people had encroached on his property and wherein he summoned those encroachers but they failed to honour the summons. That they were three invaders and one of them was the appellant herein; that having realized that he could not handle the matter, he referred it to the police.

12. PW5, Cpl. Jattan Torosha testified that he investigated the case and obtained a copy of the green card and a map sheet of the area. He then proceeded to record the statements of the witnesses and further had the three invaders including the appellant herein arrested and charged. He produced a copy of green card (Embu/Mavuria/1646) as P Ex 1; certified copy of the title deed (Embu/Mavuria/1646) as P Ex 2 and a certified map as P Ex 3. In cross examination, he testified that he found the accused living on the land after the complainant (PW1) had bought the same.

13. The prosecution proceeded to close its case and vide a ruling delivered on 11.09.2019, the court found that a prima facie case had been established and proceeded to place the accused on his defence.

14. DW1, Lincon Nguru testified that the suit property belonged to his grandfather and that he had been living on the land since 1968. Further that, he had tilled the land since then and he uses the proceeds to cater for his children's needs and therefore, there is a possibility that PW1 could have bought the property from land grabbers. In cross examination, he testified that he does not have any title document or allotment letter and further that he had no proof of any activity on the suit property.

15. DW2, Musungu Njagi Kithangato testified that DW1 came from Mugwe clan and that they have been neighbours. He corroborated DW1's testimony that they have been living on the suit property since 1968 and that his father and DW1's father used to conduct rites on the same piece of land. During cross examination, he stated that he did not know which particular property was in dispute and was not aware if DW1 had title to the property in dispute.

16. DW3, John Muthii Mbwria testified that he has been a village elder since 1999 and further confirmed that the accused's father was buried on the suit property and that they have been living on the property since 1999. In cross examination, he testified that he neither knew the suit property in question nor was he aware if the appellant had a title deed to it.

17. DW4, Severio Nyaga Mbutotia testified that he is a clan elder and that the suit property belongs to Mugwe Clan and that the clan has lived on the land since 1938. In cross examination, he stated that he knew not the property in question and further that he would not know if the said property was sold.

18. I have definitely considered the evidence tendered in the trial court as is required of this court and it is my view that the main issue for determination is whether the appeal herein is merited?

19. Section 91 of the Penal Code being the section under which the appellant was charged provides as follows;-

> ***"91. Forcible detainer***
>
> ***Any person who, being in actual possession of land without colour of right, holds possession of it, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land is guilty of the misdemeanour termed forcible detainer."***

20. The prosecution had the burden of proving the following elements:

> ***i.*** *Proof of prima facie ownership of the land in question,*
>
> ***ii.*** *Proof that the accused was illegally in actual possession of the land in question, and*
>
> ***iii.*** *Proof that the possession in question was in a manner likely to breach the owner's peace or created an impression that a breach was imminent.*

21. In **Albert Ouma Matiya v Republic [2012] eKLR Kimaru J was of the view that:-**

> **"The prosecution must establish that the accused is in actual possession of the parcel of land which he has no right to hold possession of. The prosecution will establish this if it adduces evidence which proves that the accused has no title or legal right to occupy the land.**
>
> **Secondly, the accused must be in occupation of the parcel of land in a manner that is likely or causes reasonable apprehension that there will be breach of peace against the person entitled by law to the possession of the land. "**

22. To prove ownership, PW1 in his testimony testified that he purchased the suit land from PW2 for Kshs. 30,000/= per acre and that he was given the title to the suit land upon completion of payment. A copy of the title deed (which is *prima facie* evidence of ownership) to the suit land and the green card were produced by PW5.The appellant testified that the suit property belonged to his grandfather and that he has lived on that property since 1968; that he even buried his father on the same property together with his nephew and niece's children. PW1 on the other hand, produced a title deed in his name which showed that he is the registered owner of the suit property.

23. Further, despite the appellant having testified that the title by PW1 was obtained fraudulently, there was no evidence which was tendered to prove the alleged fraud. The appellant did not avail any evidence before the court to support his allegations. As such, it is my view that the trial court did not err in finding that PWI was the owner of the land in issue.

24. In **Richard Kiptalam Biengo Vs Republic [2015] eKLR** the court held that;

> ***"…where the ownership of the land in an offence of forceful detainer is in controversy or to put it more appropriately, if the legal ownership or entitlement of the land cannot be established beyond reasonable doubt at the accused person's trial, then a conviction cannot be sustained."***

25. As for the proof that the accused was illegally in actual possession of the land in question, the defence witnesses testified that the appellant herein has been living on the suit land and has never been evicted. This was further buttressed by the fact that the appellant admitted that he was indeed in actual possession of the suit property and that he has lived there since 1968. Having found that the evidence before the trial court was sufficient to prove ownership, it therefore means that the occupation by the appellant could only be said to be illegal as it is against the ownership rights of PW1.

26. As to whether the possession was in a manner likely to cause a breach of the owner's peace or create an impression that a breach was imminent, Ngenye-Macharia J in **Florence Wanjiku Mwamunga & another v Republic [2018] eKLR,** in defining the breach of peace held that;-

> *"22.* ***The next ingredient is the proof that the possession threatened or created a breach of the peace. What constitutes a breach of peace was ably set out in the speech of Watkins LJ in*** **R *v*** **Howells [1982] 1 QB 416** *as approvingly quoted in* **Steel & others *v.* The United Kingdom [1998] ECHR 95,** *thus:*
>
> ***"A comprehensive definition of the term 'breach of the peace' has very rarely been formulated… We are emboldened to say that there is likely to be a breach of peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance....."***

27. PW1 testified that after one year, he was informed of the trespassers who were not cooperating and further had refused to move out of the suit property and so, he decided to report the matter to the area chief and thereafter, to the provincial administration. Further, PW4 testified that after the matter had been reported to him, he sought to summon the invaders in vain and at that point, he forwarded the matter to the police. As such, it is clear that the quiet and peace enjoyment which PW1 expected to have of his property was denied by the appellant.

28. It is my considered view therefore, that, the evidence before the trial court was sufficient to establish the elements of the offence facing the appellant and further return a verdict of guilty as was done by the trial court.

29. In the same breadth, the appellant alleged that the trial court never considered his evidence during the trial; the trial court in the judgment notes that after consideration of the evidence before it, it found that the testimonies of the defense witnesses was inconsistent as none was articulate on the time when the accused and his family started living on the subject property. This is in line with the view of the court that a defense, however weak has to be considered. [See **Okech Olale v Republic (1965) EA 555**].

30. On sentencing, it is now settled that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence if it is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. [See **Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR** and **Bernard Kimani Gacheru v Republic, Cr App No. 188 of 2000].**

31. Section 91 of the Penal Code creates the offence of forcible detainer and provides that the same is a misdemeanor. Section 36 provides for the general sentence for misdemeanours as follows:

> ***When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.***

32. In this case, the trial court fined the appellant herein Kshs. 30,000/= and in default, to serve Six (6) months imprisonment. In my view, the sentence by the trial court was proper and lawful. The appellant did not prove that the sentence was harsh and/or excessive, or that the trial court overlooked some material factor, or took into account, some wrong material or acted on a wrong principle. As such, the challenge on the sentence therefore fails.

33. In the end, I find that the prosecution was able to prove the charge against the appellant to the required standards. Further, the sentence meted out on the appellant was proper and within the provisions of the law.

34. The upshot of the judgment is that I find no merit in the appeal and the same is hereby dismissed. Both the conviction and the sentence by the trial court are upheld.

35. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF DECEMBER, 2021.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent